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May 2, 2007

The Honorable Skip Priest
State Representative, 30th District
P.O. Box 40600
Olympia, WA 98504-0600

Dear Representative Priest:

By letter previously acknowledged, you have requested an opinion on the following questions:

1. What political activities, such as initiative and referendum activities and other political activities, including but not limited to fund raising, campaigning, picketing, leafleting, selling items, and speaking, must be allowed (that is, may not be completely prohibited) on the premises of private shopping centers?

2. May private shopping center owners/management set reasonable time, place, and manner restrictions on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers?

3. What reasonable time, place, and manner restrictions lawfully may be imposed by private shopping center owners/management on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers, including, but not limited to, required prior permission for the activities, limiting the location of the activities, limiting the number of persons participating in the activities, limiting the frequency of the activities, limiting the time of day for the activities, establishing blackout periods, and establishing the amount of insurance to be carried by those participating in the activities?

4. What is the extent of or what are the limits on any reasonable time, place, and manner restrictions that lawfully may be imposed by private shopping center owners/management on political activities which must be

allowed (that is, which may not be completely prohibited) on the premises of private shopping centers?

5. What is the extent of or what are the limits on the ability of state and local law enforcement of reasonable time, place, and manner restrictions that lawfully may be imposed by shopping center owners/management on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers when individuals refuse or fail to comply with such restrictions?

BRIEF ANSWER

As noted in the letter from this office acknowledging receipt of your opinion request, your questions each call for discussion of the case law relating to political activities in privately-owned shopping centers. Your letter setting forth your request noted that the cases leave the law quite uncertain in a number of ways. The issues involved are constitutional in nature, requiring a balancing of both the constitutional rights of property owners and of those who desire to engage in political activities. Accordingly, the answers to your questions may ultimately be determined through litigation.[1] The manner in which the law would apply to a particular case would depend upon the specific facts and circumstances of that case. I accordingly respond to your questions by providing a general framework for analysis rather than bright-line rules.

Your first question inquires as to what political activities must be allowed on the premises of commercial shopping centers. Under Washington case law, a right of access to private property for political purposes extends only to the circulation of petitions seeking to qualify initiatives or referendums to the ballot and does not extend to other political activities. This right of access extends only to certain shopping centers and not to all shopping centers or other commercial properties. The question of whether the right extends to a particular property is determined by balancing three factors, which consist of (1) the nature and use of the property; (2) the impact of the decision upon the effectiveness of the initiative or referendum process; and (3) the scope of the invitation that the owner of the property has extended to the public. Washington courts have eschewed firm rules on the subject, preferring development of the law through a case-by-case process based on the facts and circumstances of each case.

Your second, third, and fourth questions concern the ability of property owners or managers to impose reasonable time, place, and manner restrictions upon the right of access to private property for political purposes. Washington law recognizes that property owners or

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[1] This is not to suggest that the Legislature is powerless to address the topic. If the Legislature were to address your questions in statute, Washington courts would presume the statute to be constitutional and would further presume that the Legislature considered the constitutional questions involved. *State ex rel. Peninsula Neighb'd Ass'n v. State*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Although the interpretation of the constitution would be a judicial question in the final analysis, the courts would accord this level of deference to the Legislature's judgment. *Id.*

managers may impose such restrictions. Existing court decisions have not precisely defined the scope of or limits on such restrictions. Specific cases would be resolved in light of their specific facts and circumstances, including consideration of the shopping center's need to impose restrictions in order to avoid interference with its business activities and the extent to which the petition circulator's right to circulate is reasonably accommodated.

Finally, your fifth question concerns the ability of law enforcement agencies to enforce reasonable time, place, and manner restrictions. State law permits law enforcement officers to make arrests for misdemeanors and gross misdemeanors committed in their presence, including arrests for criminal trespass where such an offense may be committed by virtue of a petition circulator's refusal to comply with restrictions. In other states, a number of cases have arisen in which petition circulators have filed tort actions for false arrest based on such arrests. Such actions would be decided based upon their individual facts, but probable cause to make the arrest is a complete defense, and even where the arrest is invalid, law enforcement officers may enjoy qualified immunity for their actions—again dependent upon the facts.

ANALYSIS

1. What political activities, such as initiative and referendum activities and other political activities, including but not limited to fund raising, campaigning, picketing, leafleting, selling items, and speaking, must be allowed (that is, may not be completely prohibited) on the premises of private shopping centers?

Your first question inquires as to what types of political activities must be allowed on the premises of private shopping centers. Because existing Washington case law on this subject draws distinctions based on both the types of political activities at issue and the character of the property on which those activities may occur, this question has two distinct dimensions. First, it calls for a discussion of Washington case law distinguishing the circulation of initiative and referendum petitions from other types of political activities. Second, it requires consideration of the distinctions that Washington courts draw based upon the nature and use of property, as well as the impact that restrictions on the initiative and referendum process may have on that process.

First, your question calls for consideration of the types of political activities in which private parties may seek to engage on the premises of privately-owned shopping centers. You ask what types of activities may be completely prohibited on shopping center property. Several prior decisions of the Washington Supreme Court, as well as federal decisions upon which they were partially based, enlighten this dimension of your first question.

In 1981, a divided opinion of the Washington Supreme Court established the proposition that the proponents of a proposed initiative or referendum have a constitutional right to seek petition signatures on the premises of a large regional shopping mall. *Alderwood Assoc. v. Wash. Envtl. Coun.*, 96 Wn.2d 230, 232, 635 P.2d 108 (1981). A plurality opinion, joined by

four of the nine justices, found such a right based upon two provisions of the Washington Constitution. These included article I, section 5, which guarantees the right to freedom of speech, and article II, section 1, which reserves to the people the right of initiative and referendum. *Id.*, 96 Wn.2d at 244. In doing so, the plurality first noted that the United States Supreme Court has expressly held that the First Amendment to the United States Constitution does not provide private parties with the right to engage in political speech on the private property of private shopping malls. *Id.* at 234 (citing *Hudgens v. NLRB,* 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972)). The plurality reasoned that, unlike the federal constitution, the free speech guarantee of the state constitution applied to political activities on the property of large regional shopping malls. *Alderwood*, 96 Wn.2d at 246.

Justice Dolliver provided the crucial fifth vote in favor of finding a constitutional right to circulate initiative and referendum provisions at large regional shopping malls. His concurring opinion, however, expressed disagreement with the conclusion that such a right could be derived from article I, section 5, guaranteeing freedom of speech. *Id.*, 96 Wn.2d at 247-48 (Dolliver, J., concurring). Justice Dolliver rather concluded that the right derived from article II, section 1 alone—the provision reserving to the people the right of initiative and referendum. *Id.* at 251. Four dissenting justices disagreed on both counts and would have found that neither constitutional provision supported the claim of a right to circulate petitions on private property. *Id.* at 254-55 (Stafford, J., dissenting).

Eight years later, the court revisited *Alderwood* in a case that did not involve the initiative or referendum process. In that second case, a private group desired to solicit contributions and sell literature on the premises of a large regional shopping mall. *Southcenter Joint Venture v. Nat'l Demo. Policy Comm.*, 113 Wn.2d 413, 415, 780 P.2d 1282 (1989). The court took that occasion to clarify that the result reached in *Alderwood* depended solely upon the state constitution's initiative and referendum provision and not on the free speech provision. Noting that a majority of the court in *Alderwood* rejected the application of the free speech provision to a regional shopping mall, the *Southcenter* court held that the proper basis for the conclusion that initiative and referendum proponents could circulate petitions on mall property was limited to the state constitution's initiative and referendum clause. *Id.* at 428-29. The court more recently reiterated this conclusion, concluding that the sole basis supporting the result reached in *Alderwood* was reliance upon the initiative and referendum provision of the state constitution. *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 631-32, 989 P.2d 524 (1999).

Accordingly, this aspect of your first question can be answered by concluding that private parties who desire to circulate initiative and referendum petitions on the property of large regional shopping malls enjoy a right to do so protected by article II, section 1 of the Washington Constitution. The scope of that provision, however, is limited to the circulation of initiative and referendum petitions. As the *Southcenter* and *Waremart* decisions clarified, the free speech provisions of neither the federal nor the state constitutions extend any similar right to private parties who desire to engage in other political activities on private property. It therefore follows

that for the purposes of the remainder of this opinion, the only political activities at issue are the circulation of initiative and referendum petitions.

Turning to the second dimension of your first question, the analysis becomes less clear. You ask what political activities can be prohibited on the property of a shopping center but do not expressly limit your question to large regional shopping malls. The Washington Supreme Court has set forth an analytic framework for deciding whether a particular commercial property is required to permit petition circulators but has eschewed the establishment of a bright-line rule in favor of case-by-case development of the law. *Alderwood*, 96 Wn.2d at 244 (determining when the right to circulate petitions attaches "must evolve with each decision, for an all inclusive definition is not practicable"); *Waremart*, 139 Wn.2d at 629 (same, citing *Alderwood*). Thus, the outcome of any specific case must depend upon the specific facts and circumstances of that case.

We do know, based on *Alderwood*, that initiative or referendum supporters must be permitted to circulate petitions at large regional shopping malls, subject to reasonable time, place, and manner restrictions. *Alderwood*, 96 Wn.2d at 245-46. We also know, based on *Waremart*, that this right "does not extend to *all* commercial private property which is open to the public." *Waremart*, 139 Wn.2d at 635. In the latter case, the court held that a particular grocery store could constitutionally exclude petition circulation entirely. *Id.* at 641.

The court explained that three factors must be applied to the facts of each particular case in order to determine whether a right to circulate initiative and referendum petitions extends to a particular commercial property. These factors are (1) "the nature and use of the property"; (2) "the impact of the decision upon the effectiveness of the initiative [or referendum] process"; and (3) "the scope of the invitation that the owner of the property has extended to the public". *Id.* at 636.

Taking each of those factors in turn, the "nature and use of the property" tends to support the right to circulate petitions if the property "becomes the functional equivalent of a downtown area or other public forum". *Alderwood*, 96 Wn.2d at 244. In the case of a large regional shopping center, which in some respects bears similarities to a traditional town square, the size and character of the facility tends to support the conclusion that the right to petition extends to that property. *Id.* On the other hand, the grocery store at issue in *Waremart* was "simply not comparable to the Alderwood Mall" in that both the store and its associated parking lot were dramatically smaller. *Waremart*, 139 Wn.2d at 636. On this factor, the case law simply does not tell us where the courts would draw the line between a large regional mall and a single grocery store.

With regard to the second factor, the *Alderwood* court noted the large number of malls within the Seattle metropolitan area and the importance that they had assumed in contemporary society. *Alderwood*, 96 Wn.2d at 246. Given their significance, the court reasoned that the denial of access to petition circulators would "significantly undermine . . . the effectiveness of the initiative process." *Id.* In contrast, the *Waremart* court held that the single grocery store at

issue in that case was more "the present-day version of the old grocery store" than the functional equivalent of a town square. *Waremart*, 139 Wn.2d at 638. The court had no concerns similar to those voiced in *Alderwood* about the effect that denial of access to a smaller retail establishment would have on the initiative process. *Id.* As applied to the general category of "shopping centers," the subject of your question, this factor might tilt the analysis either way depending on the geography and the history of a particular piece of commercial property.

The third factor is the scope of the property owner's invitation to the public. The court in *Alderwood* did not list this as a separate factor, but it did place great emphasis upon the size and social importance of large regional malls in support of the conclusion that "the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value." *Alderwood*, 96 Wn.2d at 244. In contrast, in *Waremart*, "the public [was] not invited to enter Waremart's stores for *any noncommercial purpose*, as is the case with some large regional shopping malls." *Waremart*, 139 Wn.2d at 636 (emphasis by the court). The store in *Waremart* did not "promote any public services on their locations nor do they open up areas within their stores to such activities as mall walkers or choir groups and they do not engage in mass advertising." *Id.* (internal quotation omitted). The court also noted that "there are no areas for citizens to congregate; no large common areas; nor plaza to sit, wait or converse. *In contrast to the mall, there is no intent to provide public services, entertainment or meeting space.*" *Id.* at 637 (emphasis by the court).

Finally, in concluding that the right to circulate initiative and referendum petitions did not extend to Waremart's stores, the court emphasized that "we are firm in our view that an owner of private property should generally have the right to determine what lawful activities take place on the privately owned premises." *Id.* at 641. The court characterized Washington law as a general rule against finding a constitutional right to circulate petitions on private property, accompanied by "a narrow exception to the property owner's sovereignty over the property in favor of the activities of initiative petitioners in cases where the private property on which they seek to gather signatures is a shopping center that bears the earmarks of a town square or public forum." *Id.* Even though the court's analysis involves weighing three factors on a case-by-case basis, these remarks near the close of the court's opinion suggest that courts will start the analysis with a general rule against a right of access for petition circulation and will then inquire as to whether "a narrow exception" applies. This is significant, because it strongly suggests that the right of access will extend only to relatively large retail locations. That said, the analysis may not simply be reduced to a distinction between large regional shopping malls and other establishments, because the court set forth an analysis based on multiple factors and endorsed a case-by-case approach rather than a bright-line rule.[2] The application of the factors to each case will depend

[2] The Washington court has indicated that cases from California and Oregon are "particularly relevant and persuasive because courts in each of those states have used analysis similar to that used by this court in *Alderwood* when dealing with analogous issues." *Waremart*, 139 Wn.2d at 639. California courts have drawn a similar distinction between large regional malls and other commercial properties, as our court did in *Waremart*. *See, e.g., Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 86 Cal. Rptr. 2d 442, 449 (1999) (balancing the competing interests of property owners and petition circulators to conclude that the right to petition did not

on the specific facts and circumstances of each case. No single factor would necessarily predominate; nor would two factors inevitably predominate over the third.[3]

2. May private shopping center owners/management set reasonable time, place, and manner restrictions on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers?

Your remaining questions apply to those shopping centers that may not completely prohibit the circulation of initiative and referendum petitions on their premises after applying the factors discussed in response to your first question. Since the only constitutional provision extending a right of access to private property is the initiative and referendum provision, other political activities are not at issue. *Waremart*, 139 Wn.2d at 631-32 (holding that Wash. Const. art. II, § 1 provided the exclusive basis for the court's conclusion in *Alderwood*). Similarly,

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extend to a single stand-alone store); *see also Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427 (1991) (the very reliance upon the conclusion that a large regional mall is the functional equivalent of a town center also implies that smaller businesses that do not assume the same societal role do not fall within the scope of that rule); *Costco Cos., Inc. v. Gallant*, 96 Cal. App. 4th 740, 117 Cal. Rptr. 2d 344, 355-56 (2002) (right of access for petition circulation did not extend to stand-alone warehouse store that did not share a parking lot with any other store). The potential persuasiveness of Oregon decisions is less clear, because after our court decided *Waremart*, the Oregon Supreme Court reversed its prior holding and concluded that the Oregon Constitution does not support a private right to collect petition signatures at any commercial locations after all. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 65-66, 11 P.3d 228, 243-44 (Or. 2000) (overruling *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1993)). During the time that Oregon's law recognized a right to circulate petitions at large regional malls, however, their courts also balanced a number of factors to determine whether a similar rule did, or did not, extend to other specific properties. *See, e.g., Wabban, Inc. v. Brookhart*, 142 Or. App. 261, 266, 921 P.2d 409, 411-12 (1996) (distinguishing other retail establishments from large regional malls); *see also Safeway, Inc. v. Jane Does 1 Through 50*, 141 Or. App. 541, 920 P.2d 168 (1996) (declining to enter a broad ruling on the scope of a right to petition on private property in the absence of a full development of the factual circumstances).

[3] Given the analysis set forth in *Alderwood* and *Waremart*, it is easy to imagine a case regarding a shopping center smaller than a regional mall in which the first two factors favor the property owner over the petition circulator. *Waremart*, 139 Wn.2d at 636-38. In such cases, debate might center around the third factor and whether the property owner has opened the property to noncommercial uses to such a degree that access cannot be denied to petition circulators. A California case might be worthy of note with regard to such a case. After concluding that a particular store could constitutionally deny access to all petitioners, the court considered the argument that by granting permission for some expressive activities to take place on the premises, the store made itself a public forum that must accommodate all petitioners. *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 131 Cal. Rptr. 2d 721, 736 (2003). The California Court rejected the argument, explaining that to accept it would "likely prove to be more detrimental to, than promotive of, speech and petitioning activity." *Id.* at 737. The court reasoned that, "Under [the petition circulators'] standard, the owner of private property that is not otherwise a quasi-public forum, who wished to retain primary control over the property, would have no choice but to prohibit all expressive activity on the property." *Id.* Such reasoning might support the view that a property owner does not waive all right to exclude petition circulators from the property by permitting any noncommercial use. For example, merely permitting certain uses, such as by holiday "bell ringers" or children selling cookies, need not constitute a waiver of the right to exclude petition circulators. This would make sense under the *Waremart* analysis, given that it establishes an analysis based on multiple factors rather than a bright-line rule, and a broader inquiry into the three factors would be necessary.

since the right to circulate petitions extends only to some commercial properties, but not to all of them, not all commercial properties are at issue. *Id.*, 139 Wn.2d at 635 (the *Alderwood* analysis does not extend to all commercial properties).

Washington courts have explicitly held that even when the right to circulate petitions extends to a particular property, that right is tempered by the property owner's prerogative to place reasonable time, place, and manner restrictions on the activity. *Alderwood*, 96 Wn.2d at 245; *see also Waremart*, 139 Wn.2d at 639 (citing *Lloyd Corp*, 849 P.2d 446, 453) (noting that an Oregon court had found a right to circulate petitions "subject to reasonable time, place, and manner restrictions").

> **3. What reasonable time, place, and manner restrictions lawfully may be imposed by private shopping center owners/management on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers, including, but not limited to, required prior permission for the activities, limiting the location of the activities, limiting the number of persons participating in the activities, limiting the frequency of the activities, limiting the time of day for the activities, establishing blackout periods, and establishing the amount of insurance to be carried by those participating in the activities?**
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> **4. What is the extent of or what are the limits on any reasonable time, place, and manner restrictions that lawfully may be imposed by private shopping center owners/management on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers?**

Taken together, your third and fourth questions inquire as to the parameters of permissible time, place, and manner regulations that shopping centers might impose with regard to petition circulation. Your third question asks what restrictions may be imposed, while your fourth question asks about limits that must be placed on such restrictions. Since these two questions are interrelated, they are treated together for purposes of a response.

Washington courts have produced only one published decision construing the nature of permissible time, place, and manner restrictions on the circulation of initiative or referendum petitions on private property. *Intiative 172 (Fair Play for Wash.) v. W. Wash. Fair Ass'n*, 88 Wn. App. 579, 945 P.2d 761 (1997). In that case, an initiative sponsor requested permission to collect signatures at the Western Washington Fair, which is operated by a private association on private property. The fair association granted the request, subject to two restrictions. First, the circulators were limited to a specific area of the fairgrounds, designated as a "free speech area." *Id.* at 580. Second, the duration of the circulation was limited to four days out of the 17 days the fair was operating. *Id.* The trial court upheld the restriction to the free speech area but ordered that the circulators be allowed to collect signatures for the entire duration of the fair. *Id.* at 581.

The initiative sponsors appealed, but the fair association did not, and so only the restriction to the free speech area was before the court on appeal. *Id.* at 582-83.

The Court of Appeals began its analysis by noting that under *Alderwood* (*Waremart* having not yet been decided), the right to circulate petitions on private property is limited in that the circulators "may 'not violate or unreasonably restrict the rights of [the] private property owners.'" *Initiative 172*, 88 Wn. App. at 583-84 (quoting *Southcenter*, 113 Wn.2d at 428-29)). The court discussed two considerations in the course of concluding that the restriction of petition circulators to the free speech area was constitutionally permissible. First, the court noted that the fair association had an interest in assuring that fair visitors could "freely walk the fairgrounds and independently choose to visit a specific booth, exhibit, or display." *Id.* at 584. Second, the court observed that (1) the fair reasonably accommodated the petition circulators by providing them a high-visibility location in which to conduct their activities, and (2) the initiative sponsor had not shown that this restriction seriously affected their ability to solicit signatures. *Id.* Accordingly, the Court of Appeals held that the trial court did not abuse its discretion in denying the sponsor's request for injunctive relief. *Id. See also Lushbaugh v. Home Depot U.S.A., Inc.*, 93 Cal. App. 4th 1159, 113 Cal. Rptr. 2d 700, 706-07 (2001) (California court upheld a property owner's rule limiting petition circulators to defined areas near the store exits and prohibited circulation in other locations).

The court's analysis in *Initiative 172* suggests that a court considering the constitutional reasonableness of a property owner's time, place, and manner restrictions would consider both (1) the interests of the property owner that the restriction is designed to protect and (2) the degree to which the rights of the petition circulators are accommodated. When the restriction is reasonably calculated to prevent petition circulation from interfering with the business of the shopping center, and the petition circulators are given a reasonable opportunity to collect signatures, the restriction will be upheld. To put the matter another way, we perhaps know that (1) the petitioners' right to circulate does not license substantial interference with the business of the shopping center, but (2) the petitioners' right to circulate must be reasonably accommodated.

Initiative 172 is the only case in which a Washington court has considered the validity of a time, place, and manner restriction for circulation of an initiative or referendum petition on private property. The paucity of cases on this subject accordingly militates against an individual analysis of each of the possible types of restrictions set forth in your question.[4] Moreover, all the

[4] Noting again that the Washington court has signaled the potential relevance of California and Oregon decisions to the analysis of the Washington Constitution, *Waremart*, 139 Wn.2d at 639, it is appropriate to look to the decisions of those courts for further guidance. Perhaps the most comprehensive discussion of time, place, and manner limitations appears in the decision of the California Court of Appeals in *Costco Companies, Inc., v. Gallant*. In that case, the court upheld the constitutionality of store rules that prohibited petition circulation on the 34 days each year in which the store had been the busiest and limited any individual or organization from circulating petitions on more than 5 days within any 30-day period. *Costco Companies*, 117 Cal. Rptr. 2d at 353-55. In upholding those limits, the court relied heavily upon a factual record showing the specific ways in which petition circulation had interfered with Costco's business, including customer complaints of harassment by circulators, a boycott of the store organized by a local official who believed Costco supported the views of those who circulated

other cases in which our courts have addressed time, place, and manner restrictions arise in the context of free speech issues. It is not entirely clear whether case law developed in the context of free speech cases would apply to this issue, since they derive from different constitutional provisions. As noted previously, the conclusion that petition circulators have a right of access to some private property is predicated upon article II, section 1 of the Washington Constitution (governing initiatives and referendums) rather than the First Amendment of the federal constitution or the free speech provision of the Washington Constitution (article I, section 5). *Waremart*, 139 Wn.2d at 631-32. The latter point could be significant, because in freedom of speech cases, our court applies a different standard to the review of time, place, and manner restrictions depending on whether the forum involved is a public forum or a nonpublic forum. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350-51, 96 P.3d 979 (2004).[5] It is not clear whether such a distinction, previously applied to governmental property, applies to private property or, if so, how it would apply to a shopping center. The *Initiative 172* decision might be read as rejecting the application of this type of forum analysis to petition circulation on private property, because the court considered forum analysis only in the context of an argument about governmental involvement in the property at issue. *Initiative 172*, 88 Wn. App. at 584-85 (rejecting the argument that participation by 4-H at the privately-conducted state fair constituted a joint venture with government). The court's discussion there does not constitute an explicit holding on the point, however.

In the context of free speech cases, Washington courts have also characterized reasonable time, place, and manner restrictions as being, among other things, "content-neutral." *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991). Even considering the uncertainty of the application of free speech precedent to initiative and referendum cases, it seems likely that Washington courts would apply a requirement of content neutrality in this context. If the right to circulate petitions applies to a particular property, it seems clear that limiting that right based on the subject matter or policy perspective of the initiative or referendum involved would not constitute a reasonable time, place, or manner restriction.[6]

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petitions there, verbal and physical abuse of employees by petition gatherers, monopolization of space by particular petition circulators, altercations between petition supporters and opponents, situations in which one group reserved a particular time for circulation and another group showed up unannounced and occupied the available space, and even some incidents involving firearms. *Id.* at 352-53. The court concluded that the record "clearly established that the expressive activities carried on by petition gatherers and others interfered with Costco's business operations." *Id.* at 353. *See also Robertson v. Westminster Mall Co.*, 43 P.3d 622 (Colo. Ct. App. 2001) (upholding, as reasonable time, place, and manner restrictions, mall rules that (1) limited activities to areas in front of two department stores and to the food court; and (2) permitting mall management 24 hours to review an application for activities at the mall (but holding invalid a 48-hour review period)).

[5] In free speech cases, if the property involved is a public forum, then restrictions on speech "can be imposed only on a showing of a compelling governmental interest." *City of Seattle*, 152 Wn.2d at 350. In a nonpublic forum, in contrast, a time, place, and manner restriction is valid if the distinctions it draws are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 351 (internal quotations omitted).

[6] This is not to imply that the same would be true as to properties to which the right to circulate petitions does not constitutionally apply.

5. What is the extent of or what are the limits on the ability of state and local law enforcement of reasonable time, place, and manner restrictions that lawfully may be imposed by shopping center owners/management on political activities which must be allowed (that is, which may not be completely prohibited) on the premises of private shopping centers when individuals refuse or fail to comply with such restrictions?

Your fifth and final question inquires as to the ability of law enforcement agencies to enforce reasonable time, place, and manner restrictions when individuals refuse or fail to comply. If a time, place, or manner restriction can be lawfully imposed, and if a petition circulator refuses to either comply with the restriction or leave the premises, then arguably a trespass offense has occurred. "Trespass" occurs where a person knowingly "enters or remains" unlawfully in a building or other property of another. RCW 9A.52.070 (criminal trespass in the first degree); RCW 9A.52.080 (criminal trespass in the second degree). Depending on its degree, such an offense is either a gross misdemeanor or a misdemeanor. *Id.* A police officer may arrest a person without a warrant for either a misdemeanor or gross misdemeanor if the offense is committed in his or her presence. RCW 10.31.100.

In other states, issues concerning a right of access to private property for political purposes have sometimes reached appellate courts in the context of allegations of false arrest. For example, in *Stranahan*, an initiative petition circulator was arrested for trespassing at a shopping center and sued for false arrest. *Stranahan*, 11 P.3d at 230; *see also Hamburg v. Wal-Mart Stores, Inc.*, 116 Cal. App. 4th 497, 10 Cal. Rptr. 3d 568 (2004) (protesters arrested by a store manager for trespass commenced action for false arrest); *Lushbaugh*, 113 Cal. Rptr. 2d at 701 (citizen arrest of petition circulator by store security led to lawsuit alleging false arrest, abuse of process, and violation of First Amendment rights).

Under Washington law, "[t]he gist of an action for false arrest . . . is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority". *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). An allegation of false arrest predicated upon an arrest for criminal trespass therefore requires an inquiry into whether the person arrested had a lawful right to remain on the property. In evaluating the arrest of petition circulators for failing to comply with the rules of a private property owner, such cases involve a *post hoc* inquiry as to whether the property owner or the petition circulator was correct as to the lawfulness of the restrictions. *See, e.g., Stranahan*, 11 P.3d at 236. Obviously, none of the parties can know with certainty at the time they act how a court would rule on that question. However, "probable cause is a complete defense to an action for false arrest and imprisonment." *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993). Given that point, a case might be resolved based on the existence of probable cause in light of what the officer knew at the time. Alternatively, a law enforcement officer may be entitled to qualified immunity as to such a claim based, in part, on the reasonableness of his or her actions given what he or she knew at the time. *See McKinney v. City of Tukwila*, 103 Wn. App. 391, 407, 13 P.3d 631 (2000)

(reciting elements of state law qualified immunity from false arrest); *see also Orin v. Barclay*, 272 F.3d 1207, 1214, 1216-17 (9th Cir. 2001) (finding qualified immunity from a false arrest allegation under federal law for police officers who arrested an anti-abortion protester who had failed to comply with a community college's restrictions placed on a demonstration). The local government employing the police officers may not be liable either, depending on the facts and circumstances under which the arrest was made. *Orin*, 272 F.3d at 1217 ("A plaintiff properly alleges a § 1983 action against a local government entity only if 'the action that is alleged to be unconstitutional implement[ed] or execute[d] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers'") (quoting *Monell v. Dep't of Soc. Servs*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

The result of any particular lawsuit on this subject will depend upon the specific facts and circumstances of the case, as well as the manner in which Washington law develops as to the respective rights of property owners and petition circulators. While this makes it difficult to provide a more precise answer to your fifth question, it does highlight a difference between this question and your prior questions. As noted in the introductory section above, your other questions all raise constitutional issues. Although the Legislature might appropriately address them in statute, and such an enactment would receive some deference from the courts, the issues raised are ultimately judicial in nature. In contrast, your fifth question concerns the tort liability of state or local law enforcement officers, a subject that can be more readily addressed by statute.

I trust the foregoing information will prove useful. This is an informal opinion stating the individual analysis of the undersigned and will not be published as an official Attorney General Opinion.

Sincerely,

Jeff T. Even

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